Service of a copy of the foregoing brief acknowledged this 30th day of December AD 1903.

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In the

Supreme Court of the United States

October Term, 1903

THE SHIP "IROQUOIS," ETC.,
A. CHESEBROUGH ET AL.,
Petitioners,

vs.

MATTHEW BRIDGES,
Respondent.

Brief on Behalf of Respondent

in opposition to the petition for a writ of certiorari.

A. H. Ricketts,
Counsel for Respondent.

W. G. Holmes,
D. T. Sullivan,
Proctors for Respondent.

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THE SHIP "IROQUOIS", ETC., A. CHESEBROUGH ET AL., vs.	Petitioners,	No.
MATTHEW BRIDGES,	Respondent.	

BRIEF ON BEHALF OF RESPONDENT.

At the time the respondent's leg was broken the ship "Iroquois" was a few miles to the southward of Cape Horn and distant about 480 miles southwesterly from Port Stanley, the chief port of East Falkland Island, where surgical aid could have been obtained. The wind was fair for that port, and the Judge of the District Court found it could have been made in two or three days (trans. p. 109), but his statement, in accepting the testimony of the master of the "Iroquois" that it would probably have taken from three to four weeks to have gone to Port Stanley *and return* to the place of the accident, is opposed to the entries in the mate's log-book (see page 2 of Book of Exhibits), which gives the direction of the winds prevailing after the accident.

The loss of time of such procedure is not a matter of conjecture. The accident occurred on February 23, 1900. If it would have taken so long as three days to go to Port Stanley, the return to the place of the accident could have begun on February 26. On that day the winds were such that the vessel made 127 miles in a southwesterly direction (claimant's Exhibit No. 2). On February 27 and 28 and on March 1 she would have had head winds on her return, but would have made some progress. On March 2 the wind changed to south, southeast and east, and on March 3 it was east and east-southeast. On both of said days and thereafter the winds were fair for a southwesterly course from Port Stanley to the place of the accident. Not considering any progress the vessel might have made on such return during February 27 and 28 and March 1, she could have reached the place of the accident, with the favorable winds of February 26 and of March 2 and 3, within nine days after the accident.

As a matter of fact, according to the evidence of the chart (claimant's Exhibit No. 2), the winds during February 23, 24 and 25, while fair winds for a course to Port Stanley, were unfavorable for the vessel's progress into the Pacific, and at the beginning of February 26 she was further east than she was at the beginning of February 23, thereby losing three days, so that had the vessel gone to Port Stanley the actual loss of time, going and returning, would have been not more than six days.

It is evident that the Court of Appeals was unwilling to accept the testimony of the master of the "Iroquois",

that it would probably have taken from three to four weeks to have gone to Port Stanley *and return*, as that Court says (trans. p. 128): "The District Court found " that to have returned there would have involved a " loss of time of three or four weeks, and in so finding " made, we think, more than liberal allowance for prob- " able delay and adverse winds."

The master, however, was not limited to Port Stanley as a place to land the respondent. With small loss of time he might have gone to either of several places, after rounding Cape Horn.

The vessel could have made Evangelistas or Direction Island on March 2 or 3, by sailing one or two days out of her course. Evangelistas Island, as shown by claimant's Exhibit No. 2, is near the westerly end of the Straits of Magellan. On said island is a lighthouse, and a signal from the vessel would have brought a small steamer to her and the respondent could have been taken to said island and placed on one of the line of steamers plying between Valparaiso and Sandy Point, and touching semi-weekly, going and returning, at said island. Sandy Point is on the northerly side of the Straits of Magellan, and surgical aid could have been had there. If the respondent had been landed at Evangelistas Island he could have been taken to Sandy Point within a few days, or to Valparaiso within two weeks, after the accident, and the ship "Iroquois" could have proceeded on her course from Evangelistas Island with a loss of little more than one day on her voyage (trans. pp. 97, 98 and 99).

On March 1 the vessel was about latitude 55 degrees

south, longitude 75 degrees west. With the same winds encountered by the vessel thereafter, she could have made the port of Ancud, in Chili, in latitude 42 degrees south, or thereabouts, on March 9, and from Ancud, as delineated on the chart (libelant's Exhibit No. 4), could have reached the course she took to the equator with a loss of time in her voyage of only four days.

With the same winds encountered by the vessel after March 1, she could have made the port of Valparaiso, in latitude 33 degrees south, or thereabouts, on March 15, and from Valparaiso, as delineated on the charts (libelant's Exhibits Nos. 4 and 5), could have reached her course to the equator with a loss of time in her voyage of only four days.

The charts (libelant's Exhibits Nos. 4 and 5) are duplicates of the charts (claimants' Exhibits Nos. 2 and 3), except that they also have traced on them by Mr. Carrescio, formerly an officer in the Chilian navy, the daily courses and distances the "Iroquois" in all probability approximately would have made, if on March 1 she had borne away for either Ancud or Valparaiso, and thence had proceeded from either of those ports to the course she actually pursued, and also the small loss of time in the voyage. Such tracings were made with reference to the winds encountered by the vessel after March 1 (trans. pp. 99, 100 and 101). Mr. Carrescio testified that in the month of March the winds are fair, on the courses so delineated, for reaching Ancud and Valparaiso, and that along that coast there is a current, called Humboldt current, running north about one mile an hour (trans. p. 95).

The Court of Appeals found (trans. p. 128) that the "Iroquois" could have made either Ancud or Valparaiso with a loss of time in her voyage of only four or five days.

If the "Iroquois" had borne away for Ancud or Valparaiso at a proper time, she would have taken a northerly or northeasterly course, and from either of those ports she would have taken a northwesterly course to the equator, and during all such times would have been advancing towards San Francisco, her port of destination, and in her course to Ancud or Valparaiso it is probable, in fact reasonably certain, that she would have met steamers bound to Valparaiso, Sandy Point or other South American ports, where the respondent could have been taken for surgical treatment (trans. p. 97).

If, under the favorable circumstances of winds, weather and positions presented by the evidence in the case at bar it was not the duty of the master of the "Iroquois" to seek surgical aid for the respondent, it is difficult to conceive conditions on a voyage from New York to San Francisco which would make such a duty imperative.

The language of Judge Sprague in *Brown* vs. *Overton*, 1 Sprague 462, Fed. Case No. 2024, is particularly pertinent to this case:

> "Scarcely a case can be presented where the obligation to land an injured seaman applies with greater force than the present."

In *Peterson* vs. *The Chandos*, 4 Fed. R. 645, the vessel, when the fall of a seaman from aloft caused a fracture of the femur, was in latitude 38 degrees south,

longitude 90 degrees west. A difference of opinion existed on board as to whether the leg was broken or not. The master testified that until 24 days later, when the vessel was north of the equator and 20 degrees further west, he did not think it was broken. The voyage was from New York to Portland, Oregon. Judge Deady found that it was very uncertain what time it would take to reach Valparaiso from the locality of the accident, *there being no evidence of the force or direction of the wind between those places.* He said (p. 652):

> "If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby make Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there—indeed, I think it would have been his duty to do so."

The "Chandos", like the "Iroquois", was a ship with a full cargo. If it were the duty of the master of the "Chandos" to make such sacrifice of time and risk of cargo for his seaman, notwithstanding he did not think the leg was broken, how much greater the obligation in the case of the "Iroquois", where there was no doubt as to the severity of the injury, and where the master had a choice of available ports to which he could have taken the respondent.

The master of the "Iroquois" would have performed his duty if he had *honestly endeavored* to reach a port of distress. As he made no such endeavor, the contention of petitioners that the time of a deviation (such as we allege should have been made) is problematical, is unworthy of consideration. If he had endeavored to make a port of distress it would have been ascertained

what could have been accomplished. If his wife or child had been with him and had suffered an injury similar to that of the respondent, or if his vessel had been in need of a spar, we doubt not he would have gone to a port of distress. The respondent, in the performance of the duty he owed to his employers, had exposed his life and limbs for the preservation of the vessel. The footing of a seaman on the mainyard while he is assisting in furling a mainsail is insecure in a high degree against the force of a gale of wind, and yet, when the respondent, under such conditions, lost his footing and received the injury he did, the master with all his opportunities to secure surgical aid for him, at a small expense to his owners and with a loss of only a few days' time, chose to risk bringing him to San Francisco and to expose him to the mortification likely to take place while passing through the tropics and to the accidents and discomforts inseparable from the unceasing motion of a ship at sea, and daily removals from his bunk for the performance of acts of nature, and entailed on him weeks of protracted and unnecessary suffering and the loss of a leg, and assigned as a reason (trans. p. 50) that he did not think it necessary to go into any port as he did not think the respondent could get any better treatment than he could give him. We submit that such testimony was a mere subterfuge and a sham, manufactured as an excuse for not going to a port of distress. The master admits (trans. p. 60) that there was nothing to hinder his going to Valparaiso or to any of the other ports referred to, except the expense to his owners and that such ports were out of the line of his course to San Francisco.

As said by Judge Sprague in *Brown* vs. *Overton* (*supra*), referring to the excuse of a master that his deviation to land an injured seaman would have occasioned expense:

> "This presents not the least extenuation. It is merely saying that if he had performed his duty, the owners would have been subjected to a burden which the law imposes."

And by the same Judge, referring to that master's doubts of any benefit to the seaman if he had landed him:

> "Any doubts would have been removed if the master had performed his duty. By going into port, it would have been ascertained what could have been accomplished."

The petitioners say (p. 2 of petition) that the master put *proper splints* on the respondent's leg. The master says (trans. p. 37) that he got the *splints* at the carpenter's shop, and (trans. p. 63) that he put the *splints* on. We do not doubt they were as good as the carpenter shop of a ship at sea could be expected to furnish, but we cannot agree that they were *proper*, except that they were the best *then* available.

Counsel for petitioners, both in the petition and in his brief, seeks to distinguish the master of the "Iroquois" as a commander of due discretion, reasonable, prudent and humane, uninfluenced by selfish motives, and completely faithful to his obligations to the respondent in bringing him crippled to San Francisco, and praises his surgical skill as well as his general treatment of the respondent after the injury. The master's first examination of the injured leg, after his attempt to set it, was on March 30, five weeks after the

accident, and when, as shown by the charts, claimant's Exhibits Nos. 2 and 3, the vessel was as near to San Francisco as to Valparaiso, and the master's opportunities to land the respondent in time to save his leg were gone. We submit that the degree of the master's care of the respondent after the accident is not to be measured by the vaseline supplied on and after March 30, for the relief of respondent's sores, then first discovered by the master, or by the salts, the administration of which to respondent is so highly commended by petitioners' counsel. The master testified (trans. p. 62) that when he did not dress the leg the steward did. Such dressing was not begun until March 30, when the bandages first were removed. He assigns as his reason for not removing them before (trans. p. 43) that he did not think it was safe to take the bandages off and that he had to give the bones time to knit. The testimony of Dr. White (trans. p. 81), and of Dr. Lawlor (trans. p. 86), shows that a surgeon would have removed the splints four or five days after first putting them on, and at intervals of a few days thereafter, for the purpose of examining the leg and determining whether the bones were properly in place and uniting. If on March 1, or at any other proper time thereafter, the bandages had been removed, manipulation of respondent's leg would have indicated whether the broken bones then were in place. During the five weeks prior to March 30 the master had no sensible basis for any conclusion as to respondent's condition. He was content to assume the leg was getting along all right and testified (trans. p. 62) that on March 30, when he first removed the bandages there was a union of the bones. The respondent

testified (trans. p. 25) that after March 30, his leg was dressed by himself and his shipmates in the forecastle and (trans. p. 26) that when the splints were off his leg was "loose" and "worked back and forth", "so that any body could see it". Dr. White, who amputated the leg and treated it a good portion of the time while respondent was in the hospital, also testified (trans. p. 77) that there had been no union, and the history of the case is to the same effect. The District Court (trans. p. 109), and the Court of Appeals (trans. p. 126) wholly discredited the master's testimony in this regard, and found that the fractured bones had failed to unite. A very erroneous meaning is given to Dr. White's testimony on page 4 of the petition. When Dr. White testified (trans. p. 74) that when the respondent came under his care there was nothing about the leg to indicate that he had not been properly taken care of and that "he looked as though he had been properly cared for", such testimony referred only to the period during which the respondent was at the hospital prior to time the witness took charge of him, and was in answer to questions relating to that period only.

We urge upon the Court that the master had no right to speculate on the chances that the respondent's leg *might* be properly set and *might* remain so, and that the respondent *might* recover on board the vessel, when he had opportunities, with very little delay to the vessel, to place him where he could have been properly treated and his leg saved to him beyond a peradventure. The results of such speculation are the loss to the respondent of a leg, and all its consequences during the ensuing 41 years of his expectancy of life. The

respondent was 21 years old when this cause was heard in the District Court (trans. p. 21). See "The American Table" (trans. p. 122) used by the Mutual Life Insurance Company of New York in estimating the longevity of applicants for insurance (trans. p. 69).

What was thought by the respondent's shipmates is to be found on page 30 of the transcript.

We quote from page 818 of *Bryant's Practice of Surgery*, third American edition, 1881, a standard work, as testified (trans. p. 82) by Dr. White:

> "The principles of the treatment of fractures are very simple, though the practice is often very difficult. To restore a bone to its normal position, and to keep it there by means of surgical appliances, or as John Hunter expressed it in 1787, 'to place the parts in a proper position by art, that is, as near their natural position as possible, and keep them so', are simple rules to be observed, but to carry them out often demands the highest surgical skill and ingenuity, and yet the whole treatment of fractures is really comprised in these two indications."

Dr. White (trans. pp. 76 and 77) and Dr. Lawlor (trans. pp. 83 and 84) testified that if simple fractures, similar to those of the respondent, were first treated by a surgeon even four weeks after they were received, the bones would unite, and that broken bones of a person of the age of respondent, other conditions being the same, would unite more readily than those of an older person. These witnesses also testified (trans. pp. 80 and 87) that union is complete about six weeks after the fracture, in the case of a simple fracture properly treated. The respondent had no constitutional disease (testimony of Dr. White, trans. p. 76).

We are not referred to any case, and we know of none other than the one at bar, in which the Court has deemed it necessary to speculate on what *might* have been the delay to a vessel *after* her departure from a port of distress, if she had gone to such port. We submit that if an injured seaman require surgical aid, and if such aid cannot be given him on board his vessel, and if there is an available port to which he can be taken, the obligation of the master to take him to such port arises, and that the time involved in *going* to such port determines its availability. The District Court and the Court of Appeals found each of these three conditions in the case at bar, and we would be content to allow the petition herein to be submitted without filing a brief in opposition, but for the elaborate presentation of the case to this Court by the petitioners.

Though the master be held to be a fellow-servant of the seaman in the navigation of a ship, he is not such fellow-servant

> "in respect to the owners' duty to the seamen which the master performs in their behalf and as the owners' representative * * * and when such duty is not performed and the seaman suffers injury from such neglect the ship in a proceeding *in rem*, and the owners in a suit against them, are liable for the damages suffered—"

Scarff vs. *Metcalf*, 107 N. Y. 211, 216,

where the cases on this point are cited by the Court. This case is cited by petitioners. It is a case in which by a master's neglect to call a surgeon a seaman lost a leg by amputation.

In *Danvir* vs. *Morse*, 139 Mass. 323 (a case cited by petitioners), the Court says:

> "So much of the instructions as requested the Court to rule that, if the master believed, though there would be delay in carrying the plaintiff to the port of destination, it would not be a serious delay, nor involve any serious result, then the master was not in fault in deciding as he did, was properly refused. This would have left the matter depend entirely upon the judgment of the master, if honestly exercised. Under the instructions given it was for the jury to consider the condition of the plaintiff, the situation of the master, the ease with which he might reach another port, the probability of finding medical attendance, and all other circumstances, and to determine whether the plaintiff had sustained the burden of showing that the decision of the master was otherwise than reasonable and proper, which was the true rule."

The Wensleydale, 41 Fed. R. 602 (also cited by petitioners), is a case of sickness on board a vessel and of the unwillingness of the libellant in that case to take the food provided for him. Judge Benedict, in dismissing the libel, said:

> "The facts in the case forced the libellant to rest his right to recover upon the proposition that the failure of the ship to provide a physician or a nurse, competent to prepare food calculated to tempt the appetite of the sick man, and able to compel him to take the nourishment, was neglect of the duty owing by the shipowner to the seaman."

In the *City of Alexandria*, 17 Fed. R. 390 (cited by petitioners), Judge Brown said (p. 395):

> "Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a dif-

ferent and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected the ship may be held to consequential damages" (citing cases).

In conclusion, we respectfully submit that the petition for a writ of certiorari should be denied.

A. H. Ricketts
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W. G. Holmes,
D. T. Sullivan,
Proctors for Respondent.

Service of above and receipt of copy thereof admitted at San Francisco, this 14th day of January, 1903.

Milton Andros
Counsel for Petitioners.